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In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF IN RESPONSE FOR STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency (EPA or the Agency) revised National Ambient Air Quality Standards (NAAQS) promulgated under Section 109 of the Clean Air Act, 42 U.S.C. 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the lower court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act, which rule resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation.

3. Whether the lower court erred in its unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of national ozone standards.

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STATEMENT OF THE CASE

Respondent States of Ohio, Michigan, and West Virginia submit this brief in response to the petitions by the United States Environmental Protection Agency (EPA or the Agency) and other parties for a writ of certiorari to review the decision of the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999), EPA App. at 1a. The case before the lower court arose from an EPA rulemaking regarding two pollutants regulated under the Clean Air Act – particulate matter (PM) and ozone. The Respondent States support the Statement of the Case presented in the response briefs filed by the American Trucking Associations, Inc., *et al.* (collectively, ATA) and the Appalachian Power Company, *et al.* (collectively, the CAA Industry Respondents), which discuss both PM and ozone. In this response, the Respondent States focus on just one aspect of the rulemaking – ozone.

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the Act, cited as CAA), applied an identical statutory program for six specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies to meet each standard. Each implementation plan had to provide for "attainment" of the national standard within five years, with the possibility of a five-year extension, from the time of the 1977 amendments.

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States reach attainment of each standard by a date certain – had

failed with regard to ozone. In the face of this failure, Congress established a new approach and a unique program for ozone. In Subpart 2 of Part D of the amended Act, 42 U.S.C. 7511-7511f (CAA Indus. App. at 2a-64a), Congress created an elaborate, 20-year plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour standard, which Congress codified in Subpart 2.

On July 18, 1997, EPA changed Congress's plan for ozone attainment. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm.[1] The Respondent States petitioned the District of Columbia Circuit to review that revision. On May 14, 1999, the D.C. Circuit remanded the revised standards for PM and ozone to EPA for further rulemaking. As to Subpart 2 and Congress's plan for regulating ozone, the lower court rejected EPA's conclusion that the Agency had the authority to rewrite the congressional plan. The court relied on Congress's directive that Subpart 2 must apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the Act. 175 F.3d at 1048; EPA App. at 38a. On this basis, the court held that EPA could enforce a revised ozone standard only "under Subpart 2," 175 F.3d at 1050; EPA App. at 43a, and that the Act precluded EPA "from requiring areas to comply either more quickly or with a more stringent NAAQS." 175 F.3d at 1049; EPA App. at 40a.

EPA's rulemaking and the questions it raises are of substantial importance to the States. However, as described

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[1] The response briefs of ATA and the CAA Industry Respondents describe these limits in detail.

fully below, these questions arise here within the framework of well-established principles of judicial review and rules of statutory construction. The Court need not, therefore, revisit these principles in the context of this case.

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION

The States of Michigan and West Virginia adopt the reasoning of the CAA Industry Respondents and ATA for the purpose of denying review of Question One of EPA's petition of certiorari. That question asks whether the lower court properly remanded the revised rules to EPA in order for EPA to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the lower court properly construed the scope of the Agency's discretion in defining those criteria. The State of Ohio does not oppose the Court's grant of certiorari on the "delegation" question.

If, however, the Court grants review of the delegation question, all three Respondent States urge the Court to reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents. In particular, as explained in the Brief of Respondent States in Support of the ATA and CAA Industry Cross-Petitions, the Court may avoid the delegation question altogether if it finds that EPA may consider cost in any revision of a standard under Section 109 of the Act.

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION

Questions Two and Three of EPA's petition ask this Court to review the lower court's decision that EPA may only enforce any revised ozone standard in conformity with Subpart 2 of Part D of the Act. EPA App. at 81a. EPA first

asserts that the lower court did not have jurisdiction to review EPA's decision. EPA Pet. at 19-25. Alternatively, EPA presents to this Court the same arguments EPA made to the lower court on the merits of the question, *i.e.*, the same arguments the lower court rejected in its initial decision and on rehearing. EPA Pet. at 25-29. For the reasons detailed below, neither of these questions warrants additional review by this Court.

A. The Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.

In its petition for rehearing before the lower court, EPA argued for the first time that the Agency's decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether "the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. at 21. EPA bases this argument on two grounds: first, that the lower court's test for finality is "inconsistent with the test applied by this Court and other courts of appeals;" and, second, that the action is not ripe for review because it "deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS." EPA Pet. at 10.

EPA's arguments ignore the plain language of the Act, which explicitly permitted review in this case, misrepresent the lower court's express findings, which were based on well-established principles of judicial review, and contradict the position EPA took in the final rulemaking that gave rise to this case. It is unnecessary, therefore, for this Court to grant EPA's petition on this question and to revisit established precedent in the context of this case.

1. *The Clean Air Act expressly authorizes review of EPA's action.* Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1). That petition for review must be filed within 60 days of the Federal Register notice of the promulgation, and that action may not be judicially challenged thereafter. *Id.*

As EPA points out, Section 307, 42 U.S.C. 7607, also authorizes review of a number of final actions that are locally or regionally appealable in the local circuit court of appeals, including the Agency's approval or promulgation of a state implementation plan under Section 110 of the Act, 42 U.S.C. 7410. That additional authorization, however, in no way limits review, pursuant to Section 307, of EPA's promulgation of rules *at the time of promulgation.* Nor does the case here present a request, express or otherwise, to review "classification challenges." EPA Pet. at 20. Rather, it is a challenge to a final rule governing the manner in which States are to achieve attainment of national ozone standards, and, thus, a challenge specifically provided for under Section 307's scheme for prompt review of rules and standards *upon promulgation.*

Where, as here, the Act expressly provides for the review granted by the lower court, this Court need not grant certiorari to consider this question.

2. *The lower court's decision on finality is consistent with the test applied by this Court and other courts of appeals.* EPA has correctly noted that, in this Court's view, two conditions must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the

action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Contrary to EPA's suggestion, the lower court applied this well-established test and correctly determined that both elements are satisfied here.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38,873 (July 18, 1997)(emphasis in original). EPA explained that this "final decision" represented a change from its original intention to delay revocation of the 1-hour standard until after it had approved state plans for implementing the new standard. *Id.* EPA clarified that under this final decision "the provisions of subpart 2 . . . will continue to apply for so long as an area is not attaining the 1-

hour standard. Once an area attains that standard . . . the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards." *Id.* EPA then codified this decision in Section 50.9(b) of the final rule, from which the petitions below sought review. That section provides, "The 1-hour standard set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); Mass. and N.J. App. at 113.

There is nothing tentative about this final decision. As the lower court found, it is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." 195 F.3d at 8 (EPA App. at 78a), quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Second, as the lower court found, EPA's promulgation of a revised ozone NAAQS triggered a number of "obligations" and "legal consequences." As EPA acknowledged in the preamble to the final rule, the 8-hour standard becomes immediately effective to those areas designated "attainment" under the current standard.[2] Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). Under EPA's theory of the statute, this list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), to classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and to apply an attainment date, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), then by the States to implement a plan for meeting the revised

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[2] Reliance on preamble statements to explain final legislative rules is appropriate. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157-58 & n.13 (1982).

requirements, CAA §172(b); 42 U.S.C. 7502(b). EPA's suggestion that finality does not occur until after it designates areas and the States implement plans ignores the burden on the States that flows from EPA's theory of the statute as reflected in the final rule.

The lower court's recognition of the finality of EPA's decision and the immediate obligations that flow from it is consistent not only with this Court's review in *Bennett v. Spear*, but also with the analysis of such questions invariably applied by the lower court and other courts of appeals. *See, e.g., Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1196-1200 (10th Cir. 1999); *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998); *Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

In short, there is no disagreement between this Court and circuit courts, including the D.C. Circuit, as to the proper inquiries to determine finality, nor even among the parties in this case. EPA's real contention is that the lower court incorrectly applied the law to the facts before it – a contention unworthy of this Court's review.

3. *EPA's action is ripe for review.* In determining that EPA's action was ripe for review, the lower court applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9, EPA App. at 79a.

EPA's suggestion to this Court that it should have had more time to further develop its interpretation and to "work through the various implementation provisions" could apply to any rulemaking. *See* EPA Pet. at 25. EPA could always develop its original interpretation and, through various implementation efforts, change its approach. Where, as here, the question is one of law, judicial review need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Nor must judicial review await a more concrete injury to potential petitioners. Where, as here, "decisions to be made now or in the short future may be affected" by a court's decision, review is proper. *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974).

As with its decision on finality, the lower court applied well-established principles of jurisprudence to determine that the issues before it were fit for review and that delay would cause further hardship to the parties. It is unnecessary, therefore, for this Court to revisit these established principles in the context of this case.

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below.

As an alternative to its argument that the lower court lacked jurisdiction to review the Agency's action, EPA asserts that the lower court did not decide the merits of the case correctly. As with its decisions on finality and ripeness, however, the lower court decided the merits of the Subpart 2 implementation question within the framework of well-established principles of statutory construction. The lower

court determined that EPA's decision was contrary to Congress's intent, as expressed in the plain language of the 1990 amendments to the Clean Air Act. Re-argument of this question is, therefore, unworthy of review by this Court.

1. *The interlocutory nature of the lower court's decision counsels against granting certiorari on Question Three presented by EPA.* In their briefs in response to the petitions for certiorari, ATA and the CAA Industry Respondents have fully explained the interlocutory nature of the lower court's decision, which requires additional rulemaking. *See* CAA Industry Respondents Brief in Response at 29-30; ATA Brief in Response at 16-18. The Respondent States support the arguments presented in those briefs.

2. *The lower court correctly decided that EPA may only implement any revised ozone NAAQS in conformity with Subpart 2 of Part D of the Act.* In the case below, the Respondent States argued that Subpart 2 codified the one-hour, 0.12 ppm ozone standard and, therefore, only Congress can promulgate a revised standard for ozone. The Respondent States based their argument on the explicit language of Section 181(a), 42 U.S.C. 7511(a), which applies the Subpart 2 program "by operation of law" to "[e]ach area designated nonattainment for ozone" under Section 107(d) of the Act, 42 U.S.C. 7407(d). The lower court rejected that argument, finding that EPA has authority to revise the ozone standard and to designate areas as nonattainment under Subpart 1 of Part D, which applies to all other nonattainment areas.

The court agreed, however, that EPA does not have authority to implement a more stringent ozone standard in conflict with the Subpart 2 program, which Congress established as the exclusive program for implementing the ozone standard. On rehearing, the court confirmed that "EPA can enforce a revised primary ozone NAAQS only in

conformity with Subpart 2." 195 F.3d at 10, EPA App. at 81a. The court was correct in its analysis that, even if EPA retains the authority to revise the ozone NAAQS and to designate areas not meeting that standard as nonattainment, EPA may only implement that standard using the classifications and attainment dates set by Congress in Subpart 2.

The lower court based its findings, as with its finality and ripeness findings, upon straightforward statutory construction. As *Chevron* instructs, if Congress has spoken on the "precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has clearly spoken here.

Congress enacted Subpart 2 as a comprehensive scheme to address ozone nonattainment. Specifically, as EPA acknowledges, Congress enacted Subpart 2 because the existing controls imposed under Subpart 1, which applies to other nonattainment areas, had failed to bring areas into attainment with the one-hour, 0.12 ppm standard. *See* H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74. Rather than continue to treat all ozone nonattainment areas alike, Congress allowed the various areas between three and 20 years to attain the ozone standard, depending upon the extent of the area's ozone problem. *See id.* at 146-47. Congress provided additional measures that would apply in areas that failed to achieve attainment in 20 years, or that relapsed into nonattainment in the future.

The lower court held that the detailed and comprehensive nature of the Subpart 2 program manifests Congress's intent to require EPA to implement a revised ozone standard only in conformity with Subpart 2. Anything less would conflict with Congress's plan.

First, as noted above, Congress avoided the "one size fits all" approach of Subpart 1 and provided varying deadlines for attainment. In Subpart 2, Congress provided that if an area does not meet the standard on time, the area will "bump up" to the next classification, which includes a new attainment date. If an area does not achieve compliance by the final deadline for the most polluted category, sources within the area are then subject to fees for each ton of pollutant in excess of a baseline amount. In this way, Congress acknowledged that attainment was going to be extremely difficult, if not impossible, to achieve in some areas, and crafted a plan with strong incentives, specific programs, varying deadlines, and remedial measures for areas that failed to meet the applicable deadlines.

Second, Congress mandated specific controls for each category of nonattainment and directed EPA to impose certain requirements for reducing ozone. These specific requirements are a marked departure from the historic approach, which allowed States great latitude in determining what mix of controls is most appropriate to a certain region. Again, these specific requirements were included because Congress saw that the old model could not work for ozone. *See* I Legislative History of the Clean Air Act Amendments of 1990 at 1236 (statement of Rep. Fields)("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment areas which will in turn have to impose such requirements on industry in those areas").

Third, Congress created several mechanisms by which Subpart 2 was to control ozone attainment for the entire 20-year period and beyond. In conjunction with the bump-up provisions, in Section 182, 42 U.S.C. 7511a, Congress established reasonable further progress

requirements to ensure that States are, in fact, moving towards their goal. Congress also required areas that are "serious," "severe," or "extreme" nonattainment to include "contingency plans" with specific measures that would be implemented if an area does not meet a milestone. CAA §182(c)(9), (d), and (e); 42 U.S.C. 7511a(c)(9), (d), and (e). And Congress expressly mandated that Subpart 2 would continue to apply even if attainment were achieved. CAA §181(b); 42 U.S.C. 7511(b). As a whole, these provisions demonstrate that Congress anticipated that ensuring attainment and maintenance of the ozone NAAQS would be a continuing challenge and, more importantly, that Congress created a statutory structure within Subpart 2 to meet that challenge.

Because Congress has spoken to the "precise question" of ozone attainment under the Clean Air Act, the lower court was correct in its finding that, if EPA has the authority to revise the ozone NAAQS at all, then it may implement that standard only in conformity with Subpart 2. Any further re-argument of these issues within this straightforward statutory framework is unworthy of this Court's review.

3. *The lower court's decision restores certainty for the States.* The States of Massachusetts and New Jersey petition for certiorari on the merits of the Subpart 2 question, in part because the situation resulting from the lower court's decision "creates enormous uncertainty for the states as regulators." Mass. and N.J. Pet. at 29. On the contrary, the lower court's decision *restores* the certainty that existed prior to EPA's attempted interference with the program for ozone attainment that has been in place since 1990 — Congress's program under Subpart 2.

In fact, EPA's action would have created regulatory confusion in and among States because it created two

national standards instead of one. Many States, including both Michigan and Ohio, would have had different standards applicable in different parts of the State, as some portions of each would still be subject to the one-hour standard and some would not. *See* 62 Fed. Reg. 60,318, 60,323 (July 18, 1997); 63 Fed. Reg. 2,726, 2,762, 2,778 (January 16, 1998). The same would hold true among and between States, thus making the quantification of interstate pollution, the Petitioner States' primary concern, more difficult.

But, most fundamentally, implementation of a national ozone standard in a manner not in conformity with Subpart 2 would force the States to return to the failed compliance scheme that Congress abandoned when it created Subpart 2. Such a resurrection of the historic dilemma the States had in creating a plan to comply with an unachievable standard by a specific timeframe would not only create uncertainty, but would undoubtedly prove to be unsuccessful once again.

CONCLUSION

For these reasons, the Court should deny certiorari on Questions Two and Three presented by EPA. If the Court grants certiorari on Question One of EPA's petition, the "delegation" issue, then the Court should reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents.

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